[redacted]

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

ELDORADO COAL AND MINING COMPANY, plaintiff in error,
v.
HARRY W. MAGER, COLLECTOR OF INTERNAL REVENUE for the first district of Illinois.
No. 609.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE DEFENDANT IN ERROR.

The writ of error in this case seeks to review a judgment sustaining a demurrer and dismissing a suit to recover $3,073.16, being an amount paid, under protest, as income and excess profits taxes for the year 1917.

THE FACTS.

The plaintiff in error is a mining corporation. In 1917 it decided to wind up its affairs and quit business. Accordingly it sold its assets and distributed the proceeds among its stockholders. The amount so realized and distributed exceeded the value of its assets on March 1, 1913, by $5,986.02. The tax officials required this amount to be included in its taxable income, and it is the resulting tax of which complaint is made.

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THE ISSUE.

There is no claim that the tax was not properly computed upon the income as determined by the Commissioner. Nor is it claimed that there was error in determining the amount of taxable income except in the one respect above mentioned. The sole question, therefore, is whether the profit of $5,986.02, all of which accrued after March 1, 1913, was income, when received as a result of the sale in 1917. In other words, is a gain derived from the profitable sale of capital assets, taxable income?

GOVERNMENT'S BRIEF IN NO. 608 REFERRED TO AND ADOPTED.

This case is to be heard at the same time as *Merchants' Loan & Trust Company* v. *Smietanka*, No. 608. The contentions made in that case are, so far as applicable, substantially identical with those made in this. The Government will not, therefore, burden the court by repeating the arguments advanced in No. 608, but is content to refer to and adopt its brief in that case.

LYNCH V. TURRISH, 247 U. S. 229, IS NOT IN POINT.

Much reliance is placed upon *Lynch* v. *Turrish*. But that case lends no support to the present contention. The only point of similarity between that case and this is that both deal with the taxability of a final dividend by which a corporation distributed all its assets. In the *Turrish* case the dividend, when received by a stockholder, was held not to be

income, for the very good reason that the amount distributed was not in excess of the value of the corporate assets on March 1, 1913, and hence included no gains which had accrued after that date. The distribution, therefore, served merely to return to stockholders their capital as it existed on March 1, 1913. The opinion at least assumes that, if additional amounts had been distributed, they would have been income. Here the corporation has sold its assets. After withdrawing from the proceeds the amount of its capital on March 1, 1913, it has left $5,986.02, which is clearly profit, gain, or income received in 1917.

CONCLUSION.

For the reasons stated in the brief in No. 608 and herein, it is respectfully submitted that there is no error in the judgment and it should be affirmed.

WILLIAM L. FRIERSON,
Solicitor General.

JANUARY, 1921.

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